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No. 80-802

IN THE

Supreme Court of the United States

October Term, 1980

NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER,

Petitioner,

v.

BLUE CROSS OF KANSAS CITY AND BLUE CROSS ASSOCIATION,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY OF RESPONDENT BLUE CROSS ASSOCIATION TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Respondent Blue Cross Association submits this brief in reply to the Brief for the United States as Amicus Curiae.

The arguments presented by the amicus suffer from three critical flaws: (1) Their premise—that the Court of Appeals conferred a "blanket" immunity—is erroneous; (2) The assertion that Congress intended to encourage competition in the provision of inpatient hospital services is manifestly incorrect; and (3) The claim that the Antitrust Division's business review program is being hampered by the decision of the Court of Appeals is without foundation.

1. **The Court of Appeals' decision confers no blanket immunity.** As explained in our brief (Section III.C., pages 16-17), the Court of Appeals did not hold that the Health Planning

Act of 1974 conferred a "blanket" antitrust immunity, but confined its holding to the facts of this case. The amicus charges that the Court of Appeals failed to "limit or qualify" the District Court's purported recognition of a "blanket" immunity, and instead granted immunity for "[a]lmost any form of exclusionary conduct [which] can be viewed as falling within the purposes of the [Health Planning Act of 1974]." (Amicus Br. at 5-6). This characterization is refuted by the very structure of the Court of Appeals' decision: Although the Court of Appeals adopted the District Court's discussion of legislative history, it specifically substituted its own analysis of the scope of implied repeal and neither applied nor even mentioned a "blanket" immunity. (App. 7a-11a). Moreover, although the amicus asserts that the Court of Appeals' analysis conflicts with the standards established by this Court (Amicus Br. at 7-13), the Court of Appeals cited and carefully adhered to each of these standards, as elaborated in our brief (at pages 16-17).[1]

2. Congress did not intend to encourage competition for inpatient services. The amicus, like petitioner, erroneously asserts that the Health Planning Act of 1974 and the 1979 amendments call for the "strengthening of competition" in the circumstances of this case. (Amicus Br. at 12-13). As established in our brief (Sections III.A. and B., pages 13-16), while Congress encouraged the strengthening of competition, where appropriate, in the provision of *outpatient* services, it specifically rejected competition in the provision of *inpatient* services. The interpretation presented by the amicus fails to recognize the distinction drawn in the Act's explicit provisions between services "for which competition appropriately allocates supply" and services "for which competition does not or will not appropriately allocate supply." 42 U.S.C. §300k-2(b)(2), (3).

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[1] The comparison by amicus of Blue Cross' conduct with the conduct involved in Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) is unwarranted. (Amicus Br. at 14-15). As the Court of Appeals held (App. 9a-10a), and unlike the situation in *Fashion Originators*, there *was* a regulatory scheme operating in this case. Petitioner, however, chose to ignore it, while Blue Cross chose to honor it.

3. The Antitrust Division's Business Review Procedure is not hindered by the decision of the Court of Appeals. Although the amicus contends that the decision of the Court of Appeals is "in conflict" with certain Business Review Letters prepared by the Antitrust Division of the Department of Justice (Amicus Br. at 6-7), no such conflict exists. The cited letters granted clearance to a number of health care activities, but expressed reservations with regard to agreements among hospitals to limit services. The Court of Appeals did not address this subject, and the letters did not address the Blue Cross conduct examined by the Court of Appeals. The amicus, however, assumes that the Court of Appeals' decision conferred a "blanket" immunity which would extend to almost any conduct, including agreements among hospitals, and consequently would conflict with the advice offered in the letters. (Amicus Br. at 7). Since, as noted above, there was no "blanket" immunity, such conflict is illusory.

Furthermore, the Antitrust Division has rendered advice since the release of the Court of Appeals' decision on the very subject which the amicus claims has been thrown into a state of confusion. The Business Review Letter of August 27, 1980 (which appears in the amicus brief at pages 12a-14a) was issued subsequent to the decision of the Court of Appeals, yet the Antitrust Division rendered advice regarding agreements between hospitals to limit services without even mentioning the Court of Appeals. Although the amicus suggests that HSA's and health care providers may have become uncertain as to which activities they can engage in without risking antitrust liability (Amicus Br. at 7), any such uncertainty is not the result of a conflict between the Antitrust Division and the Court of Appeals, because the two never examined the same conduct. The position stated by the Antitrust Division is simply that the Health Planning Act does not create "a complete antitrust exemption." (Amicus Br. at 6). The decision of the Court of Appeals is not inconsistent with that position.[2]

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[2] It should be recognized that while the arguments of the amicus represent the views of the Antitrust Division, which joined in the brief, they do not purport to represent the views of the Department of Health and Human Services, which did not join.

For the reasons described above, we respectfully submit that the arguments advanced by the amicus do not establish that this case warrants further review. The petition for a writ of certiorari should be denied.

December 24, 1980

Respectfully submitted,

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